

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHN LENNARTSON,

Plaintiff,

v.

PAPA MURPHY’S INTERNATIONAL  
LLC and PAPA MURPHY’S  
HOLDINGS INC.,

Defendant.

CASE NO. C15-5307-RBL

ORDER RE MOTIONS

DKT. ## 82, 85, 88

THIS MATTER is before the Court on Defendants Papa Murphy’s Holdings and Papa Murphy’s International’s Motion for Reconsideration [Dkt. #82], Plaintiff John Lennartson’s Motion for Leave to Amend his Complaint [Dkt. #88], and the Parties’ Joint LCR 37 Submission [Dkt. #85]. For approximately one year, the Court has allowed Papa Murphy’s to avoid its discovery obligations by repeatedly granting its stay requests. Another dispute between the parties about relief from deadlines and discovery obligations—issues the parties should be able to work out amongst themselves—is before the Court.

**DISCUSSION**

In May 2015, Lennartson sued Papa Murphy's for using an autodialer to text message him and his putative class members without their prior express consent, in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(1). He defined the class as "[a]ll persons ... who received one or more text message advertisements from or on behalf of [Papa Murphy's] since October 16, 2013." *See* Dkt. #1 (Complaint).

Three days before the parties participated in a Rule 26(f) conference to discuss discovery disclosures, Papa Murphy's moved for a stay of the case or summary judgment, arguing Lennartson had consented to receive promotional texts. Lennartson served his first requests for production and interrogatories a month later, and shortly thereafter, Papa Murphy's requested a stay of discovery pending the Court's decision on its motion. Lennartson begrudgingly agreed. *See* Dkt. #34 (Order on Stipulation Staying Discovery). The Court denied Papa Murphy's motion for summary judgment because it had failed to disclose its use of an autodialer to Lennartson. *See* Dkt. #40 (concluding the FCC requires telemarketers to disclose use of an autodialer when obtaining "express consent" to text promotions). It granted Papa Murphy's request for a stay, and over Lennartson's objection, continued to allow Papa Murphy's not to produce responsive discovery. *See* Dkt. #48 (Order Entering Statistical Stay).

Approximately six months later, the Court reopened this case and set new deadlines. Papa Murphy's asked for another stay, explaining that during the last one, it had petitioned the FCC for a waiver retroactively excusing its failure to disclose its use of an autodialer to those who had received its texts, and the FCC had yet to rule on its petition. It also wanted a stay pending the D.C. Circuit's review of the FCC's definition of an "autodialer." The Court denied Papa Murphy's motion at the end of August 2016.

1 The FCC ruled on Papa Murphy's petition on October 14, 2016. It waived Papa  
2 Murphy's liability to those it had texted without adequate express consent before October 16,  
3 2013. Papa Murphy's filed another motion for summary judgment, asking the Court to dismiss  
4 Lennartson's complaint because he fell within this waiver; he registered to receive promotional  
5 texts on March 2, 2012. The Friday afternoon before his response was due Lennartson moved to  
6 request relief from his deadline. He asked the Court to move his response deadline to 30 days  
7 after (1) he appealed the FCC's grant of a waiver, which he had to file before December 14,  
8 2016; (2) the Court ruled on his yet-to-be filed motion to amend his complaint to join plaintiffs  
9 who had registered to receive texts after October 16, 2013, which the Court's scheduling order  
10 required him to do by November 18, 2016; and (3) Papa Murphy's produced all outstanding  
11 discovery owed to him.

12 The Court granted Lennartson's motion [Dkt. #81], which Papa Murphy's now asks the  
13 Court to reconsider [Dkt. #82]. Papa Murphy's argues (1) the Court mistakenly granted  
14 Lennartson's proposed order, which enlarged his response deadline beyond the period of relief  
15 he requested within his motion by extending it until after a final determination of his appeal takes  
16 place. (2) Papa Murphy's also argues that because the FCC's order is enforceable, Lennartson's  
17 claims are moot, and he should not be able to escape dismissal by amending his complaint before  
18 the Court rules on Papa Murphy's summary judgment motion. (3) Finally, Papa Murphy's asks  
19 the Court to reconsider its requirement that Papa Murphy's submit all outstanding discovery  
20 before Lennartson must respond because he failed to identify which specific facts he needs to  
21 oppose Papa Murphy's motion. Instead, it asks the Court to stay all discovery until it decides  
22 Papa Murphy's motion. *See* Dkt. #85 (Motion for Protective Order in Joint LCR 37 Submission).

1 The Court considers these questions, tangled within Papa Murphy's Motion for  
2 Reconsideration, Lennartson's Motion to Amend, and the Parties' Joint LCR 37 Submission:  
3 (1) Did Lennartson's proposed order, accepted by the Court, expand his requested relief beyond  
4 that requested in his motion? (2) Should the Court grant Lennartson leave to amend his  
5 complaint, and should it continue to delay consideration of Papa Murphy's motion for summary  
6 judgment in the interim? (3) Must Papa Murphy's produce all outstanding discovery owed to  
7 Lennartson before the Court rules on Papa Murphy's motion, or is a stay of all discovery pending  
8 resolution of the motion more appropriate? Should the Court sanction Papa Murphy's for  
9 bringing its protective order?

10 First, Lennartson's proposed order did not mirror the relief he requested in his motion for  
11 suspension of his response deadline. Lennartson asked the Court for an additional thirty days  
12 after he *petitioned* the FCC for reconsideration of its waiver. *See* Dkt. #79 at 6 (Reply) ("Plaintiff  
13 simply requests the Court defer consideration of the summary judgment motion until it files its  
14 petition for reconsideration and appeal, and files its motion to join parties.") But, his proposed  
15 order suspended his response deadline until "there is a *final determination* of any appeal of the  
16 FCC Order." *See* Dkt. #75, Ex. 1 (Proposed Order); *see also* Dkt. #81 (Order Granting Relief).

17 Motions for reconsideration are disfavored. The Court will ordinarily deny them absent a  
18 showing of new legal authority or facts that could not have been brought to its attention earlier  
19 with reasonable diligence or a showing of manifest error in the prior ruling. *See* Local Rule W.D.  
20 Wash. CR 7(h)(1). "Manifest error" is a plain and indisputable error amounting to a complete  
21 disregard of the controlling law or the credible evidence in the record. *See* Black's Law  
22 Dictionary 622 (9th ed. 2009). The Court will not grant a motion for reconsideration until it has  
23 afforded the non-moving party an opportunity to file a response. *See* Local Rule CR 7(h)(3).

1 In this instance, it appears Papa Murphy's fairly brought its motion for reconsideration.  
2 Papa Murphy's has made a *prima facie* showing that by accepting Lennartson's proposed order  
3 the Court granted him more relief than he sought, though likely intended to seek. A suspension  
4 only until he appealed the FCC's waiver would hardly affect the status of his claims, but that is  
5 the relief he requested within his motion. Lennartson is therefore INVITED to clarify the relief  
6 he seeks and why within fourteen days.

7 Second, Lennartson seeks leave to amend his complaint to join parties who enrolled in  
8 Papa Murphy's text messaging program after October 16, 2013 and to assert claims under the  
9 Washington State Consumer Protection Act, RCW § 19.190.060 *et seq.* He wants to add Rita  
10 Andrews, Cassie Asleson, and Susan Shay Nohr. Andrews and Asleson enrolled in Papa  
11 Murphy's program after October 16, 2013, and Asleson and Nohr are Washington residents.  
12 Papa Murphy's argues that because the FCC waiver eliminates Lennartson's claim, which the  
13 Court may judicially notice in Papa Murphy's summary judgment briefing, it should dismiss his  
14 case rather than permit him to join additional parties.

15 A court should grant leave to amend if justice so requires. *See* Fed. R. Civ. Pro. 15(a)(2).  
16 It should do so with "extreme liberality." *See Mirmehdi v. United States*, 689 F.3d 975, 985 (9th  
17 Cir. 2012). It may decline granting leave to amend "only if there is strong evidence of 'undue  
18 delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies  
19 by amendments previously allowed, undue prejudice to the opposing party by virtue of  
20 allowance of the amendment, [or] futility of amendment, etc.'" *Sonoma Cty. Ass'n of Retired*  
21 *Employees v. Sonoma Cty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (quoting *Foman v. Davis*, 371  
22 U.S. 178, 182, 83 S. Ct. 227, 9 L.Ed.2d 222 (1962). "[T]he consideration of prejudice to the  
23 opposing party carries the greatest weight." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d  
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1 1048, 1052 (9th Cir. 2003). “[T]he non-moving party bears the burden of persuading the court  
2 that leave should not be granted.” *Dri-Eaz Prod., Inc. v. Allen*, No. C12-1638-RSM, 2013 WL  
3 3814361, at \*1 (W.D. Wash. July 22, 2013) (citing *DCD Programs, Ltd. v. Leighton*, 833 F.2d  
4 183, 186–87 (9th Cir. 1987)).

5       The first few factors weigh for Lennartson. This is his first request for amendment, he  
6 moved within the time period for joining parties, and there is no prejudice to Papa Murphy’s  
7 because he never limited his putative class to only those who registered before October 16, 2013.  
8 Lennartson defined his class as “[a]ll persons ... who received one or more text message  
9 advertisements from or on behalf of [Papa Murphy’s] since October 16, 2013.” *See* Dkt. #1  
10 (Complaint). “All persons” can include those who registered for Papa Murphy’s program before  
11 and/or after October 16, 2013.

12       Papa Murphy’s focuses on futility. It argues that under *Sze v. I.N.S.*, 153 F.3d 1005, 1010  
13 (9th Cir. 1998), Lennartson may not seek leave to add additional parties, absent a showing of  
14 prejudice to them, because the FCC’s waiver moots his claim. It alleges dismissing Lennartson’s  
15 claim and denying him leave to amend will not prejudice Andrews, Asleson, and Nohr because  
16 the statute of limitations on their TCPA claim has not run, and they could not have reasonably  
17 relied on Lennartson, a non-Washington resident, to assert their Washington state law claims.  
18 Papa Murphy’s also argues Lennartson’s proposed amended complaint is insufficient because it  
19 continues to assert his claims, on which the Court can no longer grant relief. It suggests  
20 Andrews, Asleson, and Nohr should bring their own action.

21       The Ninth Circuit concluded in *Sze* that it lacked jurisdiction to consider plaintiff’s  
22 appeal of summary judgment in INS’s favor because plaintiffs had all been naturalized, mooted  
23 their claims. *See id.* at 1008. Here, all requirements for Article III jurisdiction continue to exist.  
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1 While Papa Murphy's is likely correct that the FCC's waiver moots Lennartson's claim, this is a  
2 question for the Court, not the FCC or Papa Murphy's. The Court will decide whether the waiver  
3 mooted Lennartson's claim when it also has the benefit of Lennartson's response to Papa  
4 Murphy's summary judgment motion. In the meantime, the Court is not stripped of jurisdiction.

5 It is not futile for Lennartson to join parties and to plead their Washington state law  
6 claims, especially when two registered for Papa Murphy's program after October 16, 2013, and  
7 two are Washington residents. Because justice requires the Court GRANT Lennartson leave to  
8 amend his complaint, Papa Murphy's is DENIED reconsideration [Dkt. #81] on this issue.

9 Third, the Parties' Joint LCR 37 Submission includes Papa Murphy's motion for a  
10 protective order and Lennartson's motion for sanctions. Papa Murphy's asks the Court to reverse  
11 course by staying discovery until it considers Papa Murphy's summary judgment motion, instead  
12 of requiring Papa Murphy's to produce all outstanding discovery before considering its motion.  
13 Lennartson alleges Papa Murphy's has yet to produce any discovery from its own business  
14 records. He argues he cannot effectively respond to Papa Murphy's motion until he receives  
15 discovery on whether the FCC's express consent requirements confused Papa Murphy's and  
16 whether Papa Murphy's complied with those requirements after October 13, 2016. Papa  
17 Murphy's argues discovery of these facts will not affect Lennartson's claims or defenses because  
18 they will not change the fact that he falls within the waived time period.

19 Papa Murphy's has avoided its discovery obligations for over a year. Its filing of a partial  
20 summary judgment motion does not necessitate issuance of another stay. Its Motion for a  
21 Protective Order [Dkt. #85] is DENIED; however, Papa Murphy's has shown that the discovery  
22 Lennartson requests may not be relevant to his claims or defenses on this limited summary  
23 judgment motion. He is INVITED to respond within fourteen days to Papa Murphy's motion for  
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1 reconsideration on whether the Court should amend its order suspending his summary judgment  
2 response deadline from thirty days after Papa Murphy's produces all outstanding discovery.

3 Lennartson asks for the fees and costs required to oppose Papa Murphy's motion for a  
4 protective order. Papa Murphy's motion came before the Court while Papa Murphy's motion for  
5 reconsideration was still pending, and before Lennartson had filed his motion to join additional  
6 plaintiffs. At that juncture, Papa Murphy's had a reasonable belief that the Court would  
7 reconsider its hastily granted motion suspending Lennartson's deadlines in Papa Murphy's favor,  
8 potentially leading the Court shortly thereafter to dismiss Lennartson's claims as moot and to  
9 dispose of the case in its entirety. Papa Murphy's was therefore justified in asking the Court to  
10 excuse it from its discovery obligations. The Court DENIES Lennartson's motion for sanctions.

### 11 CONCLUSION

12 Papa Murphy's initiated the game of "let's stay discovery while we wait and see." It now  
13 seeks to play by a different set of rules. Lennartson cries "foul," but has benefited from this tactic  
14 himself. The Court ORDERS:

15 Lennartson's Motion for Leave to Amend his Complaint [Dkt. #88] is GRANTED. On  
16 this point, Papa Murphy's Motion for Reconsideration [Dkt. #82] of the Court's Order [Dkt. #81]  
17 suspending Lennartson's summary judgment response deadline is DENIED.

18 But, Lennartson is INVITED to respond within fourteen days to Papa Murphy's motion  
19 [Dkt. #82] on two other points: (1) Lennartson may clarify and explain whether he wants his  
20 response deadline suspended until "thirty days have passed from the date he appealed the FCC's  
21 order" or until "thirty days have passed from a final adjudication of his appeal." (2) He may also  
22 address whether the Court should omit his "thirty days after Papa Murphy's produces all  
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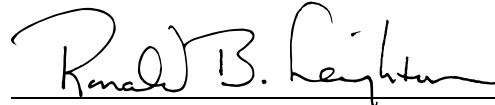


1 outstanding discovery” deadline, or whether it should specify which discovery Papa Murphy’s  
2 must produce before it will consider Papa Murphy’s pending summary judgment motion.

3 Papa Murphy’s Motion for a Protective Order [Dkt. #85] is DENIED.

4 Lennartson’s Motion for Sanctions [Dkt. #85] is DENIED.

5 Dated the 6<sup>th</sup> day of January, 2017.

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8 Ronald B. Leighton  
9 United States District Judge  
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